BASF Services (M) Sdn Bhd v Pemungut Duti Setem

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(F)-10 OF 2009 (C)
MOHD GHAZALI, HELILIAH FCJJ AND SURIYADI JCA
15 APRIL 2010

Revenue Law — Stamp duty — Assessment — Appeal by taxpayer against decision of Court of Appeal which held that assessment of stamp duty should include infrastructure fee — Development and infrastructure fees omitted in transfer form sent for adjudication — Whether infrastructure fee part and parcel of consideration in transfer instrument and so attracted stamp duty — Whether stamp duty imposed on instrument and not on transaction — Stamp Duty Act 1949 s 12A, First Schedule item 32(a)

The appellant purchased a piece of property ('the property') from Perbadanan Kemajuan Negeri Pahang ('PKNP') pursuant to an agreement dated 11 October 1997. The agreement carried the title 'Purchase, Sale, Development and Infrastructure Agreement' ('the agreement'). The agreement comprised three types of payment to be made to PKNP, namely, the purchase price of RM84,593,372, a development fee for development and preparation of the property to be undertaken by PKNP amounting to RM24,794,609 and a sum of RM61,257,269 for the infrastructure fee, also payable to the latter. The aggregate sum was RM170,645,250. Subsequently, in the transfer form which was sent for adjudication, the appellant stated the purchase price as RM84,593,372, thus omitting the development and infrastructure fees as part of the consideration. Despite that downsized contractual sum, the respondent still assessed the stamp duty on the aggregated contractual sum of RM170,645,250 under item 32(a) of the First Schedule to the Stamp Act 1949 ('the Act'). Being dissatisfied with the stamp duty imposed, the appellant filed a notice of appeal by way of case stated to the High Court. The learned judge of the High Court concluded that stamp duty was payable only on the purchase price and the development fee, thus excluding the infrastructure fee. The respondent being dissatisfied appealed to the Court of Appeal where it was held that the whole sum of RM170,645,250 was to be assessed. Hence this appeal by the appellant. Leave to appeal was granted on the following question: 'whether, in an agreement whereby the purchaser of land also appoints the vendor to carry out infrastructure works in the vicinity of the property for a fee but the completion of the sale and purchase of the property and registration of the transfer is independent of the completion of the infrastructure works and payment of the infrastructure fee, the infrastructure fee should form part of

the consideration for the transfer or conveyance of the property under item 32(a) of the First Schedule of the Stamp Act 1949.'

Held, dismissing the appeal with costs:

(1) A deed, agreement, Act or some documentary medium may be chargeable to ad valorem stamp duty, but subject to the instrument being able to transfer title (see para 14).

(2) On the present facts, the transfer form was the instrument that should attract stamp duty. This was so as the agreement of 11 October 1997 did not have the legal effect of transferring the property to the appellant. In order for the transfer of property to be effective there was another step to be undertaken by the appellant ie the filing of the transfer form, and unless duly stamped the transfer of property fell short of one step. The agreement was merely a contract to convey rather than a conveyance of the property to the appellant (see paras 15–16).

(3) The first clause of the agreement stipulated that in consideration of the deposit being paid as a sum 'towards the Purchase Price, the Development Fee and the Infrastructure Fee' PKNP agreed to sell to the appellant the property. It was a package deal. This conjunctive treatment again was provided for in cl 2, which read that the 'The Purchase Price, the Development Fee and the Infrastructure Fee shall jointly be referred to as the Price'. Regardless of the way cl 2(2) set out the manner of paying the purchase price plus the development fee, and with cl 2(3) providing for the progress payment of the infrastructure fee, cl 2(5) still treated the purchase price, the development and infrastructure fee conjunctively. The Court of Appeal correctly stated that the payments were to be read as a whole and not as separate and distinct payments (see para 21).

(4) The infrastructure fees were part of the consideration for the transfer of the property though not reflected in the transfer form. With the infrastructure contract and the purchase price interlocked and incapable of being genuinely independent, ad valorem duty was payable. The question for determination was thus answered in the affirmative (see paras 30–31).

[Bahasa Malaysia summary

Perayu membeli satu hartanah ('hartanah') daripada Perbadanan Kemajuan Negeri Pahang ('PKNP') berikutan perjanjian bertarikh 11 Oktober 1997. Perjanjian tersebut berjudul 'Purchase, Sale, Development and Infrastructure Agreement' ('perjanjian tersebut'). Perjanjian tersebut terdiri daripada tiga jenis pembayaran yang harus dibuat kepada PKPN, iaitu, harga belian RM84,593,372, yuran pembangunan bagi pembangunan dan penyediaan hartanah tersebut yang dijalankan oleh PKPN berjumlah RM24,794,609

dan sejumlah RM61,257,269 bagi yuran infrastruktur, juga harus dibayar kepada PKPN. Jumlah aggregat ialah RM170,645,250. Kemudiannya, dalam borang pindah milik yang dihantar untuk diputuskan, perayu menyatakan harga belian ialah RM84,593,372, dengan itu, tidak memasukkan yuran pembangunan dan infrastruktur sebagai sebahagian daripada pertimbangan. Walaupun pengurangan jumlah kontraktual, responden masih menaksir duti setem atas jumlah kontraktual aggregat RM170,645,250, di bawah item 32(a) Jadual Pertama Akta Setem 1949 ('Akta'). Tidak berpuas hati dengan duti setem yang dikenakan, perayu memfailkan notis rayuan menerusi kes disebut ke Mahkamah Tinggi. Hakim Mahkamah Tinggi yang bijaksana memutuskan bahawa duti setem tersebut hanya perlu dibayar atas harga belian dan yuran pembangunan, oleh itu tidak mengambilkira yuran infrastruktur. Responden yang tidak berpuas hati merayu ke Mahkamah Rayuan yang mana diputuskan bahawa keseluruhan jumlah RM170,645,250 harus ditaksirkan. Justeru rayuan ini oleh perayu. Kebenaran untuk merayu diberikan atas persoalan: 'sama ada, dalam suatu perjanjian di mana pembeli tanah juga melantik pembeli menjalankan kerja-kerja infrastruktur dalam kawasan tanah tersebut dengan bayaran tetapi penyempurnaan jual beli tanah dan pendaftaran pindah milik itu tidak terikat dengan penyempurnaan kerja-kerja infrastruktur dan pembayaran yuran infrastruktur, yuran infrastruktur harus menjadi sebahagian daripada balasan bagi pindah milik atau penyerahhakkan tanah tersebut di bawah item 32(a) Jadual Pertama Akta Setem 1949.'

Diputuskan, menolak rayuan dengan kos:

(1) Suatu surat ikatan, perjanjian, Akta atau medium dokumentar boleh dikenakan bayaran duti setem ad valorem, tetapi tertakluk kepada suratcara tersebut boleh dipindah milik haknya (lihat perenggan 14).

(2) Daripada fakta-fakta, borang pindah milik merupakan suratcara yang boleh dikenakan duti setem. Ini agar perjanjian bertarikh 11 Oktober 1997 tidak mempunyai kesan undang-undang untuk memindah milik hartanah tersebut kepada perayu. Supaya pindah milik hartanah tersebut berkesan, terdapat satu lagi langkah yang harus diambil oleh perayu iaitu memfailkan borang pindah milik itu, dan kecuali jika disetemkan, pindah milik hartanah tersebut masih belum lengkap. Perjanjian tersebut hanyalah suatu kontrak untuk menyampaikan maksud dan bukannya pemindahhakkan hartanah tersebut kepada perayu (lihat perenggan 15–16).

(3) Klausa pertama perjanjian tersebut menyatakan bahawa sebagai balasan deposit yang dibayar sebagai 'towards the Purchase Price, the Development Fee and the Infrastructure Fee' PKNP bersetuju menjual kepada perayu hartanah tersebut. Itu merupakan tawaran pakej. Urusan yang berhubungkait ini sekali lagi diperuntukkan dalam klausa 2, iaitu

'The Purchase Price, the Development Fee and the Infrastructure Fee shall jointly be referred to as the Price'. Tanpa mengira bagaimana klausa 2(2) menyatakan cara pembayaran harga belian dicampur dengan yuran pembangunan, dan klausa 2(3) memperuntukkan pembayaran ikut kerja yuran infrastruktur, klausa 2(5) masih menyatakan bahawa harga belian, yuran pembangunan dan infrastruktur berhubungkait. Mahkamah Rayuan adalah tepat apabila menyatakan bahawa pembayaran tersebut harus dibaca secara keseluruhannya dan bukannya dibaca sebagai pembayaran berasingan dan berbeza (lihat perenggan 21).

(4) Yuran infrastruktur merupakan sebahagian daripada balasan untuk pindah milik hartanah tersebut walaupun tidak dinyatakan dalam borang pindah milik. Dengan kontrak infrastrktur dan harga belian berkait dan tidak boleh diasingkan, duti ad valorem boleh dibayar. Maka, persoalan untuk dipertimbangkan dijawab 'ya' (lihat perenggan 30–31).]

Notes

For cases on assessment, see 10 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 2523–2526.

Cases referred to

Chesterfield Brewery Company v Commissioners of Inland Revenue [1899] 2 QB 7, DC (refd)

Cohen and Moore v Commisioners of Inland Revenue [1933] 2 KB 126 (refd)

Commissioners of Inland Revenue v G Angus & Co, The (1889) 23 QBD 579, CA (refd)

Commissioners of Inland Revenue v Glasgow and South-Western Railway Company (1887) 12 App Cas 315, HL (refd)

Furness Railway Company v The Commissioners of Inland Revenue (1864) 33 LJ Ex 173 (refd)

Great Western Railway Company, The v The Commissioners of Inland Revenue [1894] 1 QB 507, CA (refd)

Inland Revenue Commissioners v Duke of Westminster [1936] AC 1, HL (refd)

Limmer Asphalte Paving Company Limited v Commissioners of Inland Revenue (1872) LR 7 Exch 211 (refd)

Pernas Securities Sdn Bhd v The Collector of Stamp Duties [1976] 2 MLJ 188, HC (refd)

Prudential Assurance Co Ltd v Inland Revenue Commissioners [1993] 1 WLR 211, Ch D (distd)

Stanway Limited v Collector of Stamp Duties, Ipoh [1931–32] FMSLR 239, CA (refd)

Tan Kay Thye & Ors v Commissioner of Stamp Duties [1991] 3 MLJ 150, HC (refd)

Legislation referred to

Stamp Act 1949 ss 2, 4, 18, 23, First Schedule item 32(a)

Appeal from: Civil Appeal No C-01–48 of 2001 (Court of Appeal, Putrajaya)

Wong Chee Lin (Skrine) for the appellant.
Ahmad Khairuddin bin Abdullah (Norhisham Ahmad with him) (Legal Officer, Inland Revenue Board) for the respondent.

Suriyadi JCA:

[1] The appellant had lodged an appeal against the judgment of the Court of Appeal. Leave to appeal was granted by this court on 15 June 2009 to determine the following question:

> Whether, in an agreement whereby the purchaser of land also appoints the vendor to carry out infrastructure works in the vicinity of the property for a fee but the completion of the sale and purchase of the property and registration of the transfer is independent of the completion of the infrastructure works and payment of the infrastructure fee, the infrastructure fee should form part of the consideration for the transfer or conveyance of the property under item 32(a) of the First Schedule of the Stamp Act 1949.

[2] In order to appreciate the above question fully, a need arises for us to highlight in brief some of the antecedents and facts of the case, and they are as follows. BASF Services (Malaysia) ie the appellant purchased a piece of property held under HS (D) 20021 PT No 8030, Mukim Sungai Karang, Daerah Kuantan, Negeri Pahang ('the property') from Perbadanan Kemajuan Negeri Pahang ('PKNP') pursuant to an agreement dated 11 October 1997. The agreement carries the title 'Purchase, Sale, Development and Infrastructure Agreement' ('the agreement') and at the time of the agreement PKNP was the beneficial owner. It was yet to be issued with the document of title to the property though alienation has been approved.

[3] The agreement comprises three types of payment to be made to PKNP, namely, the purchase price of RM84,593,372, a development fee for development and preparation of the property to be undertaken by PKNP amounting to RM24,794,609 and a sum of RM61,257,269 for the infrastructure fee, also payable to the latter. The aggregate sum is RM170,645,250. In consideration of the payment of deposits towards the purchase price, the development fee and the infrastructure fee, PKNP agrees to sell and the appellant agrees to purchase the property free of encumbrances.

A [4] This agreement, which is also conditional upon approval of the Foreign Investment Committee provides that after the signing of the agreement, PKNP is to procure the issuance of a separate document of title free from encumbrances, liens etc from the relevant authorities. Upon the agreement becoming unconditional, PKNP, after receiving the issue document of title of
B the property, is to execute and deliver a valid and registrable memorandum of transfer in favour of the appellant. After the needful has been carried out in accordance with the agreement the transfer form will be sent to the collector of stamp duties, ie the respondent for stamp duty adjudication. Adjudication is the process whereby a document either stamped or unstamped is presented
C to the collector for assessment of the stamp duty chargeable. It will be the appellant's responsibility to pay the stamp duty.

[5] Even though the transfer form was sent for adjudication, the appellant
D stated that the purchase price to be RM84,593,372, thus omitting the development and infrastructure fees as part of the consideration. Despite that downsized contractual sum, the respondent still assessed the stamp duty on the aggregated contractual sum of RM170,645,250 under item 32(a) of the First Schedule to the Stamp Act 1949 ('the Act'). The First Schedule specifies
E the instruments chargeable with stamp duty and the proper stamp duty to be imposed. In the instant case, notice of assessment dated 30 December 1999, on an ad valorem basis, the collector of stamp duties had assessed the stamp duty chargeable to be RM6,799,804.

F [6] Being dissatisfied with the stamp duty imposed, the appellant filed a notice of appeal by way of case stated to the High Court. The learned judge of the High Court concluded that stamp duty was payable only on the purchase price and the development fee, thus excluding the infrastructure fee. The respondent's assessment was thereupon set aside. Ironically even though
G the development fee was not included in the transfer form, but ordered to be imposed with stamp duty by the learned judge, no appeal was filed against that decision. The respondent, on the other hand being dissatisfied appealed to the Court of Appeal and was successful in that the whole sum of RM170,645,250 was to be assessed. The appellant then filed the appeal, with
H leave granted on the abovementioned question, though still leaving the development contract unaffected.

[7] It is indisputable that the question for determination relates to the contents of the 11 October 1997 agreement, in which is included the
I appointment of the vendor, ie PKNP as the contractor to carry out infrastructure works for a fee at the property's vicinity. Despite that specific reference to the agreement, and after conceding that an instrument attracts stamp duty, the appellant preferred to choose the transfer form over the agreement as the relevant instrument chargeable to stamp duty. The basis of

referring to the transfer form over the agreement is on the premise of the words 'conveyance ... transfer ... on sale of any property' in item 32(a) of the First Schedule to the Act. The respondent on the other hand ventilated that the relevant instrument that needs adjudication is the agreement.

[8] The eventual question will boil down to whether the agreement or the transfer form is the instrument that transfers property and adjudicated in accordance with law. If the transfer form is the relevant instrument, is the respondent therefore correct in including the infrastructure fees as part of the consideration for the transfer or conveyance of the property. Section 4 of the Act is the starting point of this appeal, as it promulgates that subject to the exemptions in the Act and any written law in force, instruments specified in the First Schedule shall be chargeable with several duties specified in that Schedule. As a precursor, there must be an instrument, specifically a document, before duty arises. It follows that the transfer of a chattel, by way of physical delivery unless disallowed by some law, is itself not chargeable to any duty (*Cohen and Moore v Commisioners of Inland Revenue* [1933] 2 KB 126). It must be understood that the expression 'conveyance on sale' does not mean a conveyance where a definite contract of purchase and sale preceding it exists, but means the same as if it was upon a contract of purchase and sale. In *The Great Western Railway Company v The Commissioners of Inland Revenue* [1894] 1 QB 507, two railway companies were amalgamated to Great Western Railway by an Act of Parliament. It provided that a copy of the Act was to be chargeable with the same stamp duty, as would have been chargeable had the transaction effected by the Act been effected by an executed instrument. Here the shareholders of one company received stocks of Great Western Railway Company, whilst for the other company Great Western Railway Company paid the shareholders the principal and interest of certain outstanding debentures. The court held that the transaction by which the amalgamation was effected was in substance a transfer on sale. That being so, the stocks received, and the payment of the debenture debt were subject to ad valorem stamp duty. Here the copy of the Act was the instrument that was chargeable.

[9] This court was spared a lengthy hearing when parties agreed that stamp duty is chargeable on an instrument and not on the transaction (*Pernas Securities Sdn Bhd v The Collector of Stamp Duties* [1976] 2 MLJ 188). Further, both parties agreed that item 32(a) is applicable in the circumstances of the case, and the instrument attracts ad valorem duty based on 'the amount of the money value of the consideration or the market value of the property, whichever is the greater'. The major difference is that the appellant alludes only to the transfer form with the purchase price for adjudication, rather than the agreement and the aggregated sum arrived at by the respondent.

[10] Under the First Schedule, with particular reference to item 32(a), an instrument purporting to convey real estate is liable to duty as it falls under conveyance on sale. With the definition of instrument being so wide under s 2 of the Act, which includes every written document, the ventilation by the appellant that the transfer form is the chargeable instrument is a reasonable option, as the second part of the definition of instrument requires the transfer or the vesting of property to the purchaser. The appellant pressed on, in order to arrive at a negative answer to the question for determination that the agreement, did not operate to transfer the property to it. In his submission, the appellant canvassed that only the transfer form will transfer the property, due to the words in the impugned item. With the infrastructure fee also not included in the transfer form, which means less stamp duty being chargeable, it is no surprise too that the appellant chose this option.

[11] Sir Nathanial J Highmore in *Stamp Laws,* (4th Ed) at p 160 had occasion to write:

> It is not necessary that a conveyance on sale should be preceded by a contract of purchase and sale, and *where a conveyance is made from one person to another for money* or what is according to the provisions of the Stamp Act the equivalent of money, the *instrument is a conveyance on sale*. (Emphasis added.)

[12] In *Furness Railway Company v The Commissioners of Inland Revenue* (1864) 33 LJ Ex 173 the court held that a transfer of the undertaking of a railway company to another railway company by *deed* for similar considerations was chargeable with ad valorem duty. In *Chesterfield Brewery Company v Commissioners of Inland Revenue* [1899] 2 QB 7 *an agreement* was executed whereby all shareholders in a company in the course of being voluntarily wound up agreed to exchange their shares in the company for shares in a new company then incorporated. There was a proviso that after the allotment of the shares in the new company the shareholders in the old company would hold their shares in the old company in trust for the new company. The agreement was held to be a conveyance on sale and thus subject to ad valorem duty.

[13] Returning to s 2 of the Act, conveyance on sale 'includes every instrument and every decree or order of any court, whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser or any other person on his behalf or by his direction'. Under this provision, any transfer of any estate or interest in any property thus can take place by an order or decree of any court without more but this is a statutory concession (see also ss 18 and 23 of the Act).

[14] It is obvious as gauged from the above precedents and authorities, a deed, agreement, Act or some documentary medium may be chargeable to ad valorem stamp duty, but subject to the instrument being able to transfer title. Therefore, property may be transferred by other means, legally or equitably and not necessarily only via the process of a transfer form. Much depends on the facts of each case.

[15] Having considered the submissions of parties, in the circumstances of the case, we agree with the appellant that the transfer form is the instrument that should attract stamp duty. This is so as the agreement of 11 October 1997 does not have the legal effect of transferring the property to the appellant. Here, in order for the transfer of property to be effective there is another step to be undertaken by the appellant ie the filing of the transfer form, and unless duly stamped the transfer of property falls short of one step. Lord Esher MR had occasion to explain in *The Commissioners of Inland Revenue v G Angus & Co* (1889) 23 QBD 579:

> The taxation is confined to the instrument whereby the property is transferred. The transfer must be made by the instrument. If a transfer requires something more than an instrument to carry it through, then the transaction is not struck at, and the instrument is not struck at because the property is not transferred by it.

[16] The agreement here therefore is merely a contract to convey rather than a conveyance of the property to the appellant (*Malaysian Stamp Duty Handbook,* (4th Ed) by Arjunan Subramaniam; *Stanway Limited v Collector of Stamp Duties, Ipoh* [1931–32] FMSLR 239).

[17] Before us the appellant concedes that the consideration for the conveyance and transfer of the property includes the purchase price of RM84,593,372 and the development fee of RM24,794,609, on account of cl 16 which states that the document of title will be released to the appellant upon the agreement becoming unconditional. This is a rather unusual concession, as on one hand the appellant wants this court to accept only the transfer form as the chargeable instrument, which only records the purchase price, but concedes to the inclusion of the development fee. Surely, there is a dichotomy of sorts here, which does not favour the appellant.

[18] Now that this court has identified the transfer form as the instrument that is chargeable to stamp duty, the next step is to decide on whether the infrastructure fees are part of the consideration of the agreement and hence liable under item 32(a). It is generally acknowledged that the real substance of a transaction may not successfully be appreciated by mere perusal of a document, or by a hurried gauging of the machinery adapted by the parties of the transaction. Only after going through the exercise of construing the

document as a whole may the real substance of that transaction be known and thenceforth ascertain the respective parties' rights and obligations, and the correctness of the respondent's adjudication (*Inland Revenue Commissioners v Duke of Westminster* [1936] AC 1; *Pernas Securities Sdn Bhd v The Collector of Stamp Duties* [1976] 2 MLJ 188). *CC Gallagher Highmore's Stamp Laws* (4th Ed) at p 7 authored:

> General Rules as to Stamp Duties.
>
> *In order to determine whether any, and if any what, stamp duty is chargeable upon an instrument, the legal rule is that the real and true meaning of the instrument is to be ascertained*; that the description of it given in the instrument itself by the parties is immaterial ... For instance, if a writing were headed by a recital that the parties had agreed to execute the promissory note thereinafter written, yet if in truth the contract set forth was not a promissory note, but an agreement of another character, the stamp duty would be not that of a promissory note, but of the agreement. *The question therefore, stamp or no stamp, and if a stamp to what amount, is to be determined upon the real and true character and meaning of the writing*. It is sufficient to refer to the case of *Rex v Inhabitants of Ridgwell* [1827] 6 B & C 665, to establish this proposition. (Emphasis added.)

[19] In *Stanway Limited v Collector of Stamp Duties, Ipoh* [1931–32] FMSLR 239, Throne Ag CJ said:

> Now I would here remark that under the provisions of the Stamp Enactment the parties to an instrument become liable to pay stamp duty upon the instrument made between them, having regard to the effect of the instrument, and they cannot avoid payment of the proper duty by using a form of instrument to carry into effect the transaction which, though in name falls within one category, by its effect into another.

[20] *Tan Kay Thye & Ors v Commissioner of Stamp Duties* [1991] 3 MLJ 150, likewise echoed the sentiments of *CC Gallagher's Highmore's Stamp Laws* when the case of *Limmer Asphalte Paving Company Limited v Commissioners of Inland Revenue* (1872) LR 7 Exch 211 was quoted by the court to establish the point that what parties called a document was not important. In the current appeal, the fact that the agreement carries the title 'Purchase, Sale, Development and Infrastructure Agreement' and implying three possible separate agreements, is not decisive. It is the effect and substance of the agreement that counts (*Commissioners of Inland Revenue v Glasgow and South-Western Railway Company* (1887) 12 App Cas 315; *The Law of Stamps on Deeds and other Instruments* by EN Alpe (12th Ed)).

[21] With the above guidelines in mind, and in order to ascertain the true meaning of the agreement, let us peruse the agreement. The first clause stipulates that in consideration of the deposit being paid as a sum 'towards the

Purchase Price, the Development Fee and the Infrastructure Fee' PKNP agrees to sell to the appellant the property. In other words, it is a package deal. This initial consideration for the three components, which is collective in nature and not meant for one component, is the first step in the performance of the agreement between the appellant and PKNP. This conjunctive treatment again is provided for in cl 2, which reads that the 'The Purchase Price, the Development Fee and the Infrastructure Fee shall jointly be referred to as the Price'. Regardless of the way cl 2(2) sets out the manner of paying the purchase price plus the development fee, and with cl 2(3) providing for the progress payment of the infrastructure fee, cl 2(5) still treats the purchase price, the development and infrastructure fee conjunctively. The Court of Appeal correctly stated that the payments are to be read as a whole and not as separate and distinct payments. We see no error in the views held by the Court of Appeal.

[22] In the written submission, the appellant argued that the infrastructure works undertaken by PKNP, which include, inter alia, the construction of a public road system, water supply facilities, and the drainage system, are near the property. It further argued that as title to those areas outside the property, where infrastructure works are to be undertaken are not transferable to the appellant, the infrastructure fee therefore cannot be part of the consideration for the purchase of the property.

[23] There is a flaw to the above argument since, if the appellant is grousing that it cannot gain any proprietary rights from the works, why then did it agree to pay the infrastructure fees in the first place? Why pay a huge sum to the tune of RM61,257,269 if others could utilise for free and foresees no gain for itself? We could not but surmise that there must be some other ulterior motive for this gesture. We do not wish to be drawn into any speculative exercise, but any reasonable person could see that with the infrastructure in place, the land will lose its raw state and morph into an expensive and developed piece of property located smack in an industrial estate.

[24] In support of its argument, the appellant further brought our attention to the case of *Prudential Assurance Co Ltd v Inland Revenue Commissioners* [1993] 1 WLR 211. The facts are as follows.

[25] On 18 October 1989 the taxpayer, a company, entered into a sale agreement with two companies whereby the taxpayer agreed to purchase a freehold land with them. The two companies were developers. On the same day that the developers executed the land deal with the taxpayer, they entered into another agreement with the latter. This second agreement was a development agreement whereby the developers were to complete the

unfinished buildings on the land. The inland revenue commissioners assessed the stamp duty on the deed of transfer by reference to the total sum payable under both agreements. The taxpayer then appealed and won.

[26] Sir Nicholls VC when hearing the appeal had said the following:

> This case concerns the stamp duty payable on a conveyance. As everyone knows, ad valorem stamp duty is payable on conveyances or transfers on sale of property.... The present case calls for an examination of the position where a buyer agrees to buy a plot of land and agrees also to pay the seller to erect a building thereon. The sale of the plot of land is completed, and the builder thereafter proceeds with the building works. Is the price payable for the post-completion building works to be brought into account when assessing the stamp duty payable on the conveyance?

[27] The court when allowing the appeal stated that the sale agreement was independent of the development agreement. Even though these two agreements were part of a single transaction, in a sense that they comprised a single bargain, that transaction could not be characterised as a sale of land with unfinished buildings on it. The consideration for building works still uncompleted was not subject to stamp duty.

[28] From the elucidation of the facts given in the preceding paragraph, it is obvious that the parties had signed two agreements though executed on the same day. The first relates to the purchase of land. The second agreement was for the performance by the developers of their obligation to complete phase 2 of the development on the very site. In a gist, the two contracts were genuine, with all the works carried out on the site, and not outside it. The contracts were independent of each other. In the current appeal there is only one executed agreement inclusive of the infrastructure works to be performed by PKNP but outside the property. The consideration sum for the infrastructure works is huge and nearly equaling the purchase price of the property.

[29] After a scrutiny of the *Prudential*'s case, and without the necessity of repeating the differences, it is our view that the facts of that case are distinguishable to the facts of the current matter under appeal, and hence of no assistance to the appellant. Based on all the above reasons, we are of the view that the splitting up of the agreement into three components is a deliberate attempt to suppress and dilute the consideration of the instrument. By passing down a large chunk of the costing on some infrastructure works, supposedly quite independent of the purchase of the property, payment of stamp duty on the RM61,257,269 is avoided.

[30] To reiterate we find that the infrastructure fees are part of the consideration for the transfer of the property though not reflected in the transfer form. With the infrastructure contract and the purchase price interlocked and incapable of being genuinely independent, ad valorem duty is payable (*Commissioners of Inland Revenue v Glasgow and South-Western Railway Company* (1887) 12 App Cas 315). With the respondent's adjudication being upheld, and the law upon stamp duty altogether a matter positive juris (rules imposed by sovereign on subjects) which involves nothing of principle or reason but subject to the language of the Legislature, the notice of assessment must now be complied with (Sergeant and Sims, *Stamp Duties,* (7th Ed) at p 7).

[31] From the above prognosis, the answer to the question for determination is in the affirmative. We therefore dismiss this appeal with costs. The deposit is to be remitted to the respondent towards costs.

Appeal dismissed with costs.

Reported by Kanesh Sundrum